

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD DAVID JACKSON,

Defendant-Appellant.

UNPUBLISHED

April 21, 2005

No. 254640

Wayne Circuit Court

LC No. 03-009003-01

Before: Griffin, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b), and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(b). The jury acquitted defendant of four additional counts of CSC I. Defendant was sentenced to concurrent prison terms of twelve to twenty years for CSC I and seven and one-half to fifteen years for CSC II. We affirm.

Defendant first argues that he was denied a fair trial because of prosecutorial misconduct. We disagree. Defendant did not object to any of the allegations of prosecutorial misconduct. Therefore, we review to determine if there was plain error that affected defendant's substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Additionally, this Court will not find error requiring reversal where a curative instruction by the trial court could have alleviated any prejudice to the defendant. *Id.* at 329-330.

Defendant argues that the prosecutor improperly questioned him about the credibility of certain witnesses. We agree that it is improper for the prosecutor to ask a witness, including the defendant, to comment on the credibility of another witness. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, the questions "are curable with a limiting instruction" from the court. *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997). Here, the trial court sua sponte instructed the jury that it was to disregard testimony from a witness that another witness was truthful or untruthful and that the jury alone was to determine credibility. Because jurors are presumed to follow the instructions given, *People v Rodgers*, 248 Mich App 702, 717; 645 NW2d 294 (2001), the curative instruction alleviated any possible prejudice to defendant. *Messenger*, *supra* at 180.

Defendant next argues that the prosecutor engaged in misconduct by making remarks during her rebuttal closing statement that were meant to appeal to the jury's sympathy for the victim and her mother. *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). We have reviewed the challenged comments and do not find them to be a blatant and improper appeal to the jury's sympathy. Counsel was not suggesting that the jury should convict regardless of the evidence. Rather, the comments were tied to the evidence presented at the trial and were clearly made in response to characterizations raised in defense counsel's closing argument.

Defendant also argues that the cumulative effect of the errors denied him a fair trial. However, “only actual errors are aggregated to determine their cumulative effect,” *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999), quoting *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). Having found only one instance of harmless error, defendant's argument fails.

We also reject defendant's argument that his counsel was ineffective for failing to object to the above alleged instances of prosecutorial misconduct. Because there was no *Ginther*¹ hearing held in the trial court, this Court's review is limited to mistakes that are apparent from the lower court record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). Because the prosecutor's rebuttal argument was proper, defendant's trial counsel could not have been ineffective for failing to object to it. Counsel is not ineffective for failing to make a meritless objection. *Id.* at 142. Although we conclude it was error for the prosecutor to question defendant about the credibility of other witnesses, this error was not prejudicial to defendant, primarily because the trial court gave a curative instruction to the jury, even without an objection by defense counsel. Therefore, defendant cannot show that “there is a reasonable probability that . . . the result of the proceeding would have been different” had counsel objected to the prosecutor's questioning. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant finally argues that he is entitled to resentencing based on the United States Supreme Court's decision in *Blakely v Washington*, 542 US___; 124 S Ct 2531, 2536; 159 L Ed 2d 403 (2004). However, our Supreme Court in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), specifically opined that *Blakely* does not affect Michigan's sentencing scheme. Defendant argues that our Supreme Court wrongly concluded that *Blakely* does not apply and urges us to reject it. However, this Court is bound by the decision in *Claypool*. See *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004).

Affirmed.

/s/ Richard Allen Griffin
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).